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IN THE

Supreme Court of the United States

No. 263

THE UNITED STATES, APPELLANT,

vs.

THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLEE.

No. 264

THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Brief for the Cramp Company,

Appellant in No. 264 and Appellee in No. 263.

JOHN C. FAY,

Attorney for Appellants, The Wm. Cramp and Sons Ship and Engine Building Company

HOLMES CONRAD,
EPPA HUNTON,
Of Counsel.

IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellant, *vs.* THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Appellee.	No. 263.
THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Appellant, *vs.* THE UNITED STATES, Appellee.	No. 264.

Brief for the Cramp Company, Appellant in No. 264 and Appellee in No. 263.

Statement.

This was an action brought in the United States Court of Claims by the Cramp Company to recover for the damages accruing to them by reason of the breach of the contract on the part of the United States for the building of the battleship Indiana.

On November 18, 1890, the United States entered into a contract with the Cramp Company, by which the company agreed to build and complete the vessel on or before three years after its date, the United States agreeing to furnish the armor to the company at their ship-yard "within the times and in the order necessary to carry on the work properly." This the United States failed to do and delayed the completion of the vessel for two years after the expiration of the contract term.

The Court of Claims found that the delay of two years was due to the fault of the United States, and that the damages accruing to the Cramp Company was $177,823.55, but held that as to part of this, the company had released the United States, and rendered judgment for $135,560 only, they also disallowed a claim for $17,514.04, being the expenses for making the vessel ready for a trial trip without her armor. From this judgment an appeal was taken by both parties.

The United States assigns four errors, and the Cramp Company assign two, and the questions to be determined on this appeal and cross-appeal are:

1. Did the extension of time under Article IX, of the contract, pp. 9–10, exonerate the United States from liability?

2. Did the receipt of May 18, 1896, Finding VI, p. 20, release the United States?

3. Is wharfage a proper element of damage?

4. Is the cost of insurance properly estimated?

And on behalf of the Cramp Company:

1. Does the agreement of May 10, 1864, release the

United States from all damage arising before that date? (Ex. W. C. & S., No. 2, p. 5.)

2. Is the United States liable for the expenses for getting the ship ready for preliminary trial? (Finding XII, pp. 22-3.)

First.

Did the extension of time exonerate the United States from any damages occasioned by the breach of her contract?

The facts upon which this conclusion of law is sought to be drawn are set out in Finding IV (R., p. 19) and are that because on the fourth day of December, 1895, *fifteen days* after the vessel had been completed, delivered and accepted by the United States the Secretary of the Navy extended the time of completion, *retroactively*, to the date of acceptance; he thereby discharged the United States from all liability to respond to the damages caused by its breach of its contract.

Precisely what would have been the liability of the United States if the order of extension had not been made by the Secretary we are not admonished by the learned counsel; but we may assume that but for the retroactive extension, the United States would be liable in the same manner as all other delinquents are. The bald proposition is, that after this liability occurred, the Secretary of the Navy by the magic of this order utterly destroyed the vested rights of the Cramp Company and acquitted the United States from all liability.

R.R. Co. vs. *Howard*, 13 How., 342.

The findings show that the cost of the entire delay was brought about by the United States, and no part of it was in any degree chargeable to any act or default of the Cramp Company, and that the default caused a loss to it of $177,823.55. How the extension of time compensated the Company for this loss is not explained, but it is insisted that the words "shall *entitle* the party of the first part," which are usually understood to confer a benefit, are by the construction of learned counsel claimed to confer a loss. Without them he does not deny that the United States would have been bound to bear the consequences of its own default; but with them the ship company became "entitled" to the inestimable privilege of bearing the loss itself. If this is a right conferred on us by the contract we most respectfully waive the benefit of it.

The proposition is somewhat startling, to say the least of it, but unless some artificial or abstruse rule of law has taken the place of and superseded natural justice and fair dealing, it is as unsound and untenable as it is originable and ingenious, but, nevertheless, the learned Attorney General argues, and with apparent sincerity, that the effect of the provision for an extension of time was "to make the contract term three years or as much longer time as might be required by delays attributable to the Navy Department or its agents." If this be true it is not possible to conceive why the United States convenanted to deliver material "within the time and in the order required to carry on the work properly;" such a construction makes that covenant utterly meaningless.

In the case of Manfield *vs.* N. Y. C. R. R., 102 N. Y., 213, the Court of Appeals of New York says:

> "It is unreasonable to suppose that the parties intended to enter into obligations providing for the performance of work by one party under a heavy penalty for non-performance within a given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion."

And again:

> "A construction which enabled the railroad company to retard the prosecution of the work by the contractors or disabled them from employing all of the agencies or force which in their judgment could be wisely and advantageously used in its performance would operate as a fraud upon them and render their covenant to complete the work in five months a reckless and foolhardy undertaking."

It would be the equivalent of saying that A agrees to do certain things in consideration that B does certain other things, but at the same time while A will hold B to his contract A will do as he pleases about performing his.

Even if no promisd had been written in the contract the law would have implied it.

Smith *vs.* R. R., 36 N. H., 458, 493.

Surratt *vs.* Mallin, 82 Pa. Stat., 333.

Black *vs.* Woodrow, 39 Md., 194.

The discrimination that the learned counsel makes between delays occasioned by the United States and the

officers of the United States connected with the Department of its Navy is not only very subtile but amusing. What branch of the public service except the Navy Department was to have to do with the building of this warship is not suggested, but it is seriously argued that, if possibly the Postmaster General or the Secretary of Agriculture should cause the delay, the time was not to be extended but simply no penalty was to be imposed.

The completion of the vessel was not fixed definitely at *three years*, but "on or before" three years, and the United States was to furnish the armor in proper time and order to carry on the work properly; if the work was not progressing satisfactorily, under Article XIII, R., p. 13, the contract might be declared forfeited. This made it incumbent on the United States to furnish the armor so that the vessel could be completed in as short a time as possible, and its failure to do so undoubtedly made it responsible for any damage that accrued, during the contract period as well as after. If it delayed the work three months, but still the vessel was finished in three years, it could not escape, but if the delay was so great that it exceeded the three years, then by extending the time it could. The logic of the United States is that for *short delays* not involving an extension of time the United States was liable, but for *long delays* it could escape by granting an extension.

The labored argument to show that there was to be no extension of time except in case the delay was caused by the officers of the navy is the purest *sophistry;* what was to happen if the delay was caused otherwise? Was the

vessel to be abandoned at the expiration of the contract period, or was it to be finished after the contract period expired? The only conclusion that can be drawn from the contract is, that the company were to go on, and that was the construction placed on the contract by the parties, because the work went right along after the expiration of the contract period as before; the time was in fact extended long before the Secretary made his order, in fact the extended time had expired more than two weeks before. The only purpose the order served, if it served any, was to enable the disbursing officer who paid the voucher to set-settle his accounts with the accounting officers of the Treasury. It appearing that the vessel was not finished till November, 1895, some explanation had to accompany the voucher to show why the penalties had not been deducted as the contract provided, or the voucher would be suspended for explanation.

The learned Court of Claims, in its opinion (R., pp. 27, 28), shows very conclusively why the construction of the IXth Article of the contract now claimed by the appellants never could have been in the minds of the parties, and that such construction would do violence to its language and perpetrate a wrong and hardship on the Cramp Company. The exaction of the special release of May 10, 1894, R., p. 16, where the Cramp Company was required to release all claim for damages sustained by reason of the failure of the United States to comply with its contract, would have been unnecessary if the parties to the contract had understood that a mere extension of time wiped out any claim; the contract term had then long since expired,

and the United States were in default in furnishing the armor. Why, if the Secretary believed that by a stroke of his pen he could wipe out the liability of the United States, did he exact this release? His view of the contract is further illustrated in his letter to Congress of December 8, 1896, in response to the Act of June 30, 1897, directing him to examine this claim and report to Congress (Ex. H. R. Doc. No. 69, 54th Cong., 2d Sess.) wherein he states that there was delay and part at least was due to the failure of the United States to furnish armor as required, "and in my (his) judgment the interest of justice demand that they (the claim) should be referred to the Court of Claims," and while he does refer to and call attention to the release of May 10, 1894, and says the Cramp Company claims exemption from its effect on the ground of duress, he never intimates that it was ever for a moment suspected by him that the extension of time, which he himself had made, was intended to acquit the United States, but says that "justice demands" the reference to a court. If the "extension of time" barred a recovery how idle to put the Cramp Company, as well as the United States, to the cost and expense of a litigation. When suit was brought why was not this extension of time pleaded as a release instead of the tiresome and expensive taking of a volume of proof on both sides? This position is not only an afterthought, but a very poor one. (See Appendix.)

The cases cited by the learned counsel, *i. e.*, Haydenville M. & M. Co. *vs.* Art Institute, 39 Fed. Rep., 484, and Richard *vs.* Clark, 88 N. Y. Supp., 242, are so fully dis-

posed of in the opinion of the learned Court of Claims that it would seem to be almost a work of supererogation to further criticise them. The learned counsel, in his endeavor to bring this case within what he deems to be the ruling in the Haydenville case, assumes that the word "failed," in Finding III, p. 18, implies negligence or fault upon the manufacturer of the armor from whom the United States bought it. That is a strained construction. If it had been true, the United States would have been able to recoup any damages that it is forced to pay; but in view of the fact that the whole record in the court below showed an exactly opposite state of facts, it is not quite candid on the part of the learned counsel to try to torture this word into any such meaning.

As the contract provided in Article IX, R., p. 19, that "delays in obtaining materials" was not to exempt the Cramp Company from penalties for delay, the effort of the United States to escape liability upon the same ground that they denied to the other party to the contract is hardly commendable.

It is, however, immaterial whether the manufacturers were in fault or not; they were not responsible to Cramp Company, nor had we any contract relations with them; we can only look to the United States. We do not think the Haydenville case sound law, even as there applied, for the great current of authorities hold it to be the duty of the employer to have the work in readiness for the contractor.

In the case of Sharp *vs.* Ross, 4 N. Y. (Keyes), 554, the court held:

"If one contracts to perform work, if he finds obstacles in the way which cannot be removed without the payment of money, it is the duty of the party contracted with to remove the obstacles, and so enable him to perform his contract. He may require the party to remove them and if such party fails, he will be excusable and may recover full profits."

In Mansfield *vs.* N. Y. C. & H. R. R. Co., 120 N. Y., 206, the court says:

"Where the obligation of performance by one party to a contract presupposes the doing of some act on the part of the other prior thereto, the negligence or refusal by the latter to perform such act not only dispenses with the obligation of performance by the former, but also entitles him to rescind or, where rescission will not afford him an adequate remedy, to continue the work and recover damages against the defaulting party as the delinquency has occasioned."

See also,

Peck *vs.* Collins, 70 N. Y., 382.
Booth *vs.* Mill Co., 74 N. Y., 21.
Jones *vs.* Kent, 80 N. Y., 558.
Allamon *vs.* Mayor, 43 Barb., 33.
N. E. I. Co. *vs.* R. R., 91 N. Y., 153.
Lawson *vs.* Hogan, 93 N. Y., 39.
Dubois *vs.* D. & K. C. Co., 4 Wend., 285.
Lawson *vs.* Wallasy, L. R. Wend O. B., 229.
Kellogg *vs.* Hamilton, 110 U. S., 108.
Roberts *vs.* Bury Imp. Co., L. R. 5 C. P., 325.
Mansfield *vs.* N. Y. Cent. R. R., 102 N. Y., 205.

Lawson *vs.* Wallasey Local Board, 52 L. J. C. B., 302.
Dubois *vs.* Del. Canal Co., 4 Wend., 285.
Nelson *vs.* Pickwick Assn., 30 Ill. App., 333.
U. S. *vs.* Mueller, 113 U. S., 153.
Blanchard *vs.* Blackstone, 102.
Skelsey *vs.* U. S., 23 Ct. Cls., 61.

But its attempted application to the facts in this case would render it still worse.

The case of Richard *vs.* Clark is at best *obiter*, for the merits of the appeal had been disposed of and a new trial awarded, which, if the expression of the opinion by the justice was the law, it was idle to remand the case to be retried; it would have been remanded with directions to dismiss the complaint. The doctrine is not sound and it finds no support in any other case, and is at war with the cases above cited and common justice, and permits one to take advantage of his own wrong, and enables one to plead the breach of his contract as a bar to recover damages for the breach, and in the case at bar it would be writing into a contract a construction that neither party ever suspected that it meant.

The well known doctrine that a contract is to be taken most strongly against the party who prepares it is here invoked, and if such an unconscionable construction was to be claimed by the United States, as is now attempted, the United States ought to have taken care to have used some language that would not have to be extended by ingenious construction.

Second.

Final Receipt.

The final receipt was nothing more or less than an acknowledgment of the payment of the balance of the special reserve, and while it was very verbose the multiplicity of words did not change its legal effect.

Its first recital (R., p. 20) disproves that it was the result of the adjustment of a disputed or disputable account for every "condition," "covenant," and "provision" of the contract on the part of the Cramp Company had been "performed and fulfilled," and in consideration thereof, and for no other consideration, became entitled to receive the money paid. It is now claimed that this sum of money not only paid this claim, but that it also embraced other distinct claims, to wit., unliquidated damages arising from the breach of the contract on the part of the United States, which were not only not presented or considered, but were of such a character that the Secretary of the Navy had neither the right, authority, or jurisdiction to consider, adjust, or pay. It would have been idle to have presented a claim for damages for delay to the Secretary for adjustment. He was not clothed with authority to act upon it, nor was he supplied with any appropriation of public money with which to liquidate it.

This question has been often decided by the Court of Claims, has been so held uniformly by opinions of successive Attorneys-General and the decisions of the Comptrollers of the Treasury.

In Brannan's Case, 20 Ct. Cls., 223, the court says, no authority exists in executive officers to allow claims for damages, and approves the decision of the Secretary of War that "there is no authority in any executive officer to allow claims for damages on contract;" the fact that the converse of this proposition is now urged by the United States is the only justification of citing authorities to the contrary.

McKees *vs.* U. S., 12 Ct. Cls., 555.

Powers *vs.* U. S., 18 Ct. Cls., 263–275.

Dunbar *vs.* U. S., 19 Ct. Cls., 493.

McClure *vs.* U. S., 19 Ct. Cls., 179.

Dennis *vs.* U. S., 20 Ct. Cls., 119–121.

Pneumatic Gun Carriage Company *vs.* U. S., 36 Ct. Cls., 71.

Opinions Attorney-General, 4 Opin. 327–367, 6 Opin. 516, and others.

Decision of 2d Comptroller A. D. 1860, Secs. 458–464.

And in the case of McElrath *vs.* U. S., 102 U. S. 426 this court allowed the United States to recover back a payment made which the accounting officers had no authority or jurisdiction to allow.

There was no necessity to protest; a protest would not have had any effect whatever.

The claim for damages here sued for was not a claim "under and by virtue of the contract;" it did not arise by reason of the fulfillment on the part of the Cramp Company of all the conditions, covenants and provisions that he undertook. It arose not under, but by reason of the violation of the contract by the United States.

The case of Coulter *vs.* Board of Education, 63 N. Y., 365, distinctly holds that a receipt as comprehensive as this does not release such damages as are here claimed, and the general words upon established principles would be limited to the items specified, and cites 1 Edw. Ch. 34; 1 Cowan, 122, and cases there cited in support of this proposition; so far as that case is applicable to this it is an ample authority for sustaining the decision in this case.

The part of the decision that the United States invokes has no application, in that the Board of Education was clothed with the power and authority to adjust these unliquidated claims, and the court puts its decision upon the agreement that claims "arising out of or in consequence of the contract should be *liquidated*." *Coulter* was required to present his claims under the contract for extra work, and all other claims; they were then to agree upon the amount due and he was to receive the balance.

Here the Company was not to receive anything except the balance of the special reserve of the contract price; nothing was to be considered with respect to the final release except for the work provided in the contract, not even the extra work and certainly not the damages for delay. Large amounts of extra work were done, but they were not to be considered or paid for in this accounting.

If the Secretary had had jurisdiction to entertain the claim for delays and had found as the court did that the damages were $177,000, and that $150,000 of extra work had been done, could it be claimed that the payment of

the balance of the special reserve due upon the contract ($41,132.86), was to be in final discharge of them? To state the proposition is to refute it, still that is just the effect the United States seeks to assign to it. The second article of the contract provides for extra work and for the ascertainment of its value. Neither the extra work nor the speed premiums were to embraced in this final receipt; it was a final receipt only for the balance of the contract work, and neither its language nor Article XIX of the contract extends it beyond that (R., p. 15).

In the case of *Fire Insurance Co.* vs. *Wickham*, 141 U. S., p. 577, where a release executed upon payment of the fire loss was claimed to cover the cost and expense of raising the vessel, this court said:

> "It was not seriously contended that the defendant was not legally liable upon its policies for the expenses clearly incidental to the fire, as well as for the direct injury to the vessel in consequence of the fire, and if the plaintiffs were induced to settle their claims for one-half the amount that was due them, and there was no consideration for the relinquishment of the other half, this suit will lie for the recovery of the amount. The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue."

See also,
U. S. *vs.* Bostwick, 94 U. S., 53, 67.

In the case of the Pneumatic Gun Carriage Co. *vs.* U. S., 36 C. Cls., 71, this identical question was before the court, upon a receipt in the exact form, and upon a claim arising from delays on the part of the Government in supplying material, and the court there held that it was no bar to the suit. On page 93 the court says:

> "The Secretary of the Navy having expressly declined to give the board appointed to investigate the account authority to award any damages for delays and interruptions, and having refused to entertain these claims himself on the report of this board it cannot be said that the release given was in settlement of disputed claims between the parties on account of the delays and interruptions. These demands remained open on their merits. The receipt given by the plaintiff was not founded on any agreement to release claims not considered, and it was not a settlement of matters excluded from consideration by the Secretary. There was no adjustment of differences by way of compromise and settlement of claims for delays because of the unreadiness of the vessel at the proper place or because of interruptions to plaintiff in subsequently endeavoring to install its pneumatic system upon the monitor at Brooklyn." * * * "If the balance conceded by the Secretary was due by the terms of the contract, the payment thereof did not create a new consideration for the relinquishment by plaintiff of its other demands against the United States. To make the receipt of a part the discharge of the whole there must be a new consideration or a voluntary and well-understood compromise of a disputable and disputed claim (Child *et al. vs.* United States, 12

Wall., 232, and 7 C. Cls., R., 209; Mann *vs.* United States, 17 Wall., 67, and 8 C. Cls., R., 125; Comstock's case, 9 C. Cls., R., 141)."

"Nothing can be treated as a consideration that is not intended as such by the parties (Insurance Association *vs.* Wickham, 141 U. S., R., 564, and authorities there cited; Cape Ann Granite Company *vs.* United States, 20 C. Cls., R., 1.)"

"In the progress of the work the attention of the Secretary of the Navy was constantly called to the causes which operated to create the claims for damages. Both supplemental contracts recognized the fault to be largely on the defendants. When the settlement came to be made the Secretary kept within the terms of the contract and directed the payment of sums only which he had the right to direct to be paid."

"As the causes which gave rise to the claims for damages were not considered by the board for want of jurisdiction, and were disregarded, no doubt, by the Secretary for the same reason, so far as his official action was concerned, judgment will be entered in favor of the plaintiff. (See also Lovett *vs.* U. S., 12 C. Cls., R., 84, affirmed Sup. Ct., 94 U. S., 53; Baldwin *vs.* U. S., 15 C. Cls., R., 297.)"

See also McLaughlin *vs.* U. S, Ct. Cls.

The case of Phelan *vs.* Mayor does not appear to be applicable to the case at bar. The effect of the final receipt in that case as now claimed for it is at variance with the case of *Coulter* and the cases there cited.

The ruling of the Court of Claims as to this should be affirmed.

Third.

That wharfage should not have been allowed.

The occupation of the Company's wharf was just as legitimate a charge as any other, certainly as the occupation of the shops, the yard and the use of the tools. The vessel had to be berthed somewhere after she was launched, and the Company had to provide a wharf for two years. This allowance as the court says in its opinion (R., p. 36) includes the pay of watchmen, dredging out the basin, tug service in moving her to and from the wharf, and other expenses usually incurred by wharfingers in maintaining a wharf to afford a berth for this vessel. If the vessel had been berthed at an adjoining wharf, the Cramp Company would have been compelled to pay wharfage. What difference does it make that the company itself owned the wharf? The vessel had to be kept somewhere while awaiting the delivery of the armor, and as she was afloat it is hard to see where she could have been kept except at a wharf. The counsel for the United States simply disagrees with the court as to matters of fact. He assumes that this wharf is part of the yard, and its occupation is included in the allowance for superintendence, use of yard, &c., while the court says it is not. If it was and the court had simply added it to the other item instead of allowing it as a separate item, as it was claimed in the petition and proved by the evidence, the United States would have had no complaint. This court can hardly judicially know what it is worth in the port of Philadelphia to berth a vessel of 10,000 tons displacement, drawing 24 feet of water, 350 feet long and 66 feet

beam, and costing over three million dollars, exclusive of armor, and it would hardly be appropriate to take the learned counsel's assertion as against the finding of the Court of Claims, derived from the testimony of numerous ship-builders, merchants, ship-brokers, and wharf-owners, adduced before them. The allowance for wharfage covered an outlay for dredging of $15,504.50; tug service, $5,783, and watchmen, $2,080, a total outlay of $23,367.50, so that the allowance for wharfage merely reimburses the company for its actual cash outlay.

Fourth.

Insurance.

The theory of the counsel for the United States is purely chimerical. He imagines that the Secretary might have required more insurance than he did during the contract period, but there is no finding of fact on which to base his theory; he should have proved his premises and asked a finding and not relied on imagination. The Secretary was the sole judge of how much insurance should be carried, limited only by the fact that he could not exceed the amount of partial payments. He was not required to demand the maximum; all he could fairly do was to keep sufficient insurance to meet any probable loss; this he did, and during the contract period the company paid it. This was an iron vessel and its total destruction by fire was impossible. The little inflammable material it contained could not have caused a loss anything near the cost of the vessel. By the method adopted by the court, which was the way the claim was made, the Cramp Company did not get as much as they were

entitled to. They only got the amount actually paid out during the delay. It is a matter of common knowledge that insurance premiums are paid in advance, and by this means all the premiums that were paid before the period of delay which carried the insurance during the delay were not allowed. To illustrate, the premiums for insurance taken out for one year from July 1, 1893, the Company got no credit for, and so as to all other payments prior to Nov. 19, 1893. These amounts, which are facts capable of proof, vastly exceed in amount any imaginary deficit in insurance that might have been required but which was not, there is no possible way of determining that moot question.

As the court below allowed the Company less than they were entitled to the United States has no ground of complaint.

The error of the United States is twofold: first he offered no proof and could offer none and asked no finding as to the amount of insurance that was omitted during the contract period, and failing to do this, it is unbecoming to criticise the Court of Claims. His second error is in overlooking the fact that insurance premiums are paid in advance, and the only proper way to arrive at the correct amount, if a proportion of the two years' delay was to be allowed was exactly as the court below did. The proof before that court showed the dates of payment and the period they covered. The argument of counsel is parallel with his theory as to the effect of the extension of the contract both equally valueless.

Respectfully submitted. JOHN C. FAY,

Atty. for W. C. & S. S. & E. B. Co.

IN THE SUPREME COURT OF THE UNITED STATES.

THE WILLIAM CRAMP SONS SHIP AND ENGINE BLDG. CO.	No. 264.
vs.	
THE UNITED STATES.	

Cross Appeal from the Court of Claims.

Brief of the Cramp Company, Appellant, on Cross Appeal.

STATEMENT.

The facts out of which the *cross appeal* grows are contained in the proviso of the third article of the contract (R., p. 7), and in Findings V and XII (R., pp. 19, 22, 23), and are substantially as follows:

Up to March, 1894, three months after the contract period had expired, the United States had failed to furnish any of the *heavy armor* for the vessel as provided in Article III (Finding II, R., p. 18), or any at all in its proper order, and the vessel was then entitled to a trial trip under the provisions of said article without her armor, both the Department and the contractors expected such a trial would take place, and this had been the universal course of business up to that time in the building of seven vessels (Finding XII, 2 par., R., p. 22). The Secretary of the Navy, under date of March 9, 1894, wrote to the Cramp Company stating that "in view of the fact that the trial would take place at an early day and as you (the Cramp Company) are now probably making

preparation therefor," that he had directed two of his officers to supervise the expenses incurred in *preparing* the vessel for trial. This they did, and the vessel was prepared for such trial under their supervision at an expense of $17,514.94, and the vessel was tendered for its trial trip without its armor on between May 1 and May 10, 1894 (R., pp. 22, 23). The Secretary refused to permit the trial trip to be made until the vessel was fully completed and ready for delivery under Article X of the contract. He also refused under Article XI (R., p. 11) to release any of the retained percentages on the twenty-seven partial payments already made, or to make any further payments until after the trial trip had taken place.

If the trial had taken place the claimants would have received, approximately—

Retained percentages, 27 installments, about...	$270,000
Three installments (under contract), about.....	300,000
Special premium earned.....	50,000
	$620,000
Trial expenses.....	17,514
	$637,514
Less special reserve.....	60,000
	$577,514

all of which, except the trial expenses, but for the default of the United States, would have been paid to the Cramp Company prior to November 19, 1893.

In addition to this the Company, as found by the court, had already expended $42,263.55 in the care of the

vessel after the expiration of the contract period (Finding XIII, R., p. 23), so that the United States fairly and honestly owed the appellants at this time $619,777.55 and probably another $50,000 for additional speed premium if the trial had taken place then.

Under this state of case $234,830, being the reserved percentages of 23 of the 27 installments earned by the appellants, was turned over to them upon their furnishing a bond with surety to return it to the United States on demand, as an indemnity against loss or damages, and the further condition was exacted that all loss or damage occasioned by the failure of the United States to comply with its contract was released (R., pp. 16, 19).

Assignments of Errors.

1. The court erred in failing to allow the additional sum of $17,514.94, the expenses incurred in preparing for the preliminary trial.

2. The court erred in holding the supplemental contract of May 10, 1894, to be valid.

3. The court erred in failing to allow the sum of $177,823.55, the total cost and expense as found by the court during two years' delay instead of the sum of $135,560.

4. The court erred in not rendering judgment for the sum of $195,338.49, being for the full two years' delay and the trial expenses instead of $135,560.00.

ARGUMENT.

Preparation for Preliminary Trial Trip.

It is difficult to understand how the learned court below failed to allow this item of expense, except upon the theory that the court entirely overlooked or failed to give any force or effect to the proviso of Article III of the contract (R., p. 7). No mention whatever is made of it either in the findings or the opinion, and the opinion seems to assume that the Company took the initiative in proposing such a trip, and had acted on the sole theory that it was in accord with the previous course of business instead of a right under the contract. The facts as found by the court (Finding XII, p. 22) are quite the reverse of this contention.

On March 9, 1894, the Secretary first called the Company's attention to the fact that a trial would take place at an early date, and designated his officers to supervise its preparation; not until more than two weeks had elapsed, viz., March 24, 1894, was it that the Company gave notice that the vessel, except as to the "fittings of the armor," would be ready for trial between May 1 and May 10, 1894. The Secretary permitted all this preparatory work to go on, well knowing that it would be much more than a year before it would be possible to furnish the armor, and he well understood that no such trial trip as was provided for in Article X was ever contemplated or could possibly be made. No officers would have to be designated to supervise expenses, if no temporary work was to be done. No preparation was necessary if the vessel was entirely

completed. But such a detail was necessary and of value if the vessel had to have temporary work to fit it for trial; if its armor shelf was to be planked up, in the absence of armor; if a temporary pilot house was to be built in the absence of conning tower; if the turret and redoubt spaces were to be planked in the absence of turrets and redoubts; if the vessel was to be properly weighted down with pig lead and iron and the weights properly distributed it was highly necessary that naval officers should be designated to supervise this work and to check expenses, that would have to be borne by the United States, if she was to be tried without her armor as Article III stipulated. Both parties understood that clause of the contract alike; it was a contemporaneous construction of that proviso, and the Secretary has never denied or intimated that he did not so understand it. The findings show (Finding XII) that the Secretary refused to permit that trip to be made because a board reported that "*the vessel was not then and would not be by May 1, 1894, ready for the official trial trip in accordance with the tenth article of the contract, and that such should not in the interest of the Government take place until the vessel was fully completed and ready for delivery*" (R., p. 23).

"Upon that report the Secretary acted." The first part of the report gave the Secretary no information that he did not already have. He knew as well before as he did after that the vessel was not finished. The board did not say that it was not in condition to be tried under Article III, neither did the Secretary. Seven previous vessels had been tried under the same conditions (XII

Finding, p. 22). The reason, and the only reason given, is that "in the interest of the Government" a trip should not take place "until the vessel is fully completed and ready for delivery."

Is it possible that the United States can disregard the obligations of its contract and the rights of the appellants and saddle a cost of $17,000 upon them under any such pretext as that?

The trial of the vessel was to test "the hull and fittings, the machinery, including engines, boilers, and appurtenances, the equipment and speed of the vessel" (R., p. 11). The hull was completed, except the part left for the side armor. That was simply weight. It was no part of the structure of the vessel. It did not affect its staunchness. A similar number of tons of pig lead properly distributed would test the strength of the hull and its resistance. So as to the weight of the turrets the vessel properly weighted down would test its speed. The machinery, engines, and boilers were all complete. Article X, p. 11, contemplated weighting down the vessel, and even a *final trial* under the second paragraph of Article XI (R., p. 12), the vessel, if not fully armed or equipped, might be "weighted correspondingly," and up to the final trial, five months after delivery, the Company was bound to make good deficiencies, and had given satisfactory bonds to do so.

In view of the very large amount of money that was contingent upon the success of this trial trip it was one of the most important parts of this contract to the Company, and in further view of the fact that the *expense* of

an unsuccessful trial was to be borne by the Company, no harm could come to the United States if it was unsuccessful.

The refusal of the Secretary to permit a trial in the face of the plain terms of the contract, and which carried with it such dire consequences to the Company, and when the United States was in default in furnishing the armor under the terms of its contract, was unjust, unfair and oppressive, violative alike of the rights of the Company as well as every principle of fair dealing. It is respectfully urged that the learned court below erred in not allowing the appellants the sum of $17,514.94, which they find was the reasonable expense incurred in preparation for this preliminary trial trip, every dollar of which expenditure was caused by the failure of the United States to comply with the terms of its contract.

The learned court below (R., opinion, p. 37) seemed to place the rejection of this item on the ground that the Secretary of the Navy had no lawful authority to authorize this trial trip, but Article III expressly provided for such a trip and it was to be made "under conditions prescribed or approved by the Secretary of the Navy (X Article, R., p. 11). The exact condition had arisen that he foresaw when the contract was made, and the Company was entitled to relief. It was the duty of the Secretary to cause the vessel to be tested, and the contract contemplated a test in a much less advanced stage of work than the vessel actually was in when it was offered for trial.

Supplemental Agreement, May 10, 1894.

1. The appellants contend that this agreement is invalid and of no force and effect, because

First. It is founded upon no valid or valuable consideration, and was not within the jurisdiction of the Secretary to exact.

Second. That it was procured under considerations and circumstances amounting to duress.

First.

The learned court below expressed grave doubt as to the validity of this release (opinion, p. 35) and reluctantly held it to be founded upon a sufficient consideration; but in doing so we respectfully submit fell into several serious errors of fact upon which their conclusion was based.

One is, in entirely overlooking the trial trip provided for in Article III, another, is the assumption that on May 10, 1894, the Secretary had not decided the cause of delay, that is to say the responsibility for the delay was then in dispute. The Findings V (p. 19) were modified by inserting "finally decided," so as to exclude the idea that the responsibility for the delay was in doubt, but the opinion was not changed. The responsibility for the delay was as well known then as now, as is fully shown by Finding III (R., p. 8). None of the heavy armor had even begun to be furnished until months afterwards. These two facts very materially weaken, if they do not destroy, the conclusion which the court so reluctantly reached.

All that has been said about the right of the appellants to a preliminary trial under Article III is applicable here. If that is true, then more than three times the amount paid was due and owing at the time this release was exacted. Finding III (R., p. 18) shows that "The claimant would have completed the vessel within the contract period if it had not been for the failure of the United States to furnish materials, etc., as they had agreed to furnish." How can it be claimed that the retained percentages which certainly had been overdue since Nov. 19, 1893, were not payable, unless the United States can escape by taking advantage of its own wrong? The findings show that the appellants released a valid indebtedness of $42,263.55, and in its true sense were not paid anything; they were allowed to receive $234,830 of money earned by them, and which was only on deposit with the United States as a security for the faithful performance of their contract, by substituting for it a bond with approved securities and which they would have received if the trial had taken place. That is as near as it comes to being a payment. The money they got belonged to them. The United States has no ownership in it. It was not money of the United States. The United States had a contingent right only to apply it to make good any default. (Quinn *vs.* U. S., 99 U. S., 30) The United States never parted with any of its money. It merely exchanged securities. In lieu of cash it took bonds. It paid nothing whatever. Instead of changing its condition to its disadvantage it bettered it to the extent of over $42,000. The cold

analysis of this transaction is that the Company to obtain $234,000 that belonged to them paid the United States $42,000 to get it. They not only took the loss but paid a bonus for the privilege of getting it.

The only consideration that passed in this transaction was from the Company to the United States. Any consideration to the Company is absolutely wanting.

In Fire Insurance Co. *vs.* Wickham, *supra*, it was contended that the payment of the loss five days after proof of loss instead of waiting for sixty days was a sufficient consideration for the release, the court says, p. 580:

> "There is no doubt that this right to delay payment was a stipulation which the insurer could waive at his own option (Ins. Co. *vs.* Norton, 96 U. S. 234, 240) and if as the plaintiff stated the Insurance Company did exercise this option and agree to waive their right to sixty days' delay, the prepayment cannot be regarded as a consideration to support the alleged compromise."

While the following point may be technical, it is a fact that the United States never carried out the terms of the agreement of May 10, 1894. That agreement provided that the United States should "pay so much of the aggregate amount of the last three installments of the contract price," etc., but they never paid one cent out of these three installmen ts. What was paid was under a different arrangementaltog ether (Findings V, R., p. 19). Not one dollar was ever paid (?) under the terms of the agreement of May 10, 1894. True it is that in June, 1894, the reservations on 23 of the 27 installments were

turned over to the Company, on the execution of a bond, but that was not according to the terms of the agreement of May 10, 1894. That agreement provided for a part payment of the last three installments. No part of either of them was paid, and while it may be immaterial out of which fund the money came, so long as the Company got it, still if the United States insists on standing upon this agreement it behooves it to comply with its strict requirements. Strictly speaking the United States never carried out its part of the agreement of May 10, 1894. It may have released something near the same amount of money, but the doctrine of *Cy pres* does not apply. It did not do what it covenanted to do, and before it can insist upon the enforcement of an unconscionable agreement it ought to show that it had performed strictly its part of the bargain.

The contract provided for payments to be made as the work progressed: that was the *vital* point in paragraph 2 of Article XIX (R., p. 15); the number of installments and their exact equality was merely a matter of convenience it was a provision of no particular advantage to either party, but that the contractor should receive payment for his work (less ten per cent.) as he performed it was of vital interest. On May 10, 1894, the company ought to have been paid for the work that they had done under the very terms of the contract, and if the Secretary of the Navy under the method he had adopted to ascertain the amount of work performed had failed to pay them for it, he was bound to make another estimate and right that error, and this is all he did. He was to

pay what the work amounted to *less* the special reserve, *less* the cost of all unfinished work, *less* all deductions likely to be made on account of deficiencies, *less* all contingencies likely to happen, and even then to exact a a bond of indemnity with sureties. The balance certainly was what was due, and it ought to have been paid without the exaction of a bond. It represented less than the work done and showed that the partial estimates had been short. How the receipt of such a payment could afford a consideration for the release passes comprehension.

See *Fire Ins. Co.* vs. *Wickham, supra; U. S.* vs. *Bostwick*, 94 U. S., 53, 67.

On May 10, 1894, the United States owed the appellants for damages accruing to them by reason of the breach of the contract on the part of the United States, then an unliquidated claim. This claim the Secretary of the Navy had no power or jurisdiction to settle or adjust. See cases cited, *supra*. Could he do *indirectly* what he was unauthorized to do directly? If he could not extinguish this claim by payment, could he give the Company any other consideration for its extinguishment? If so, where did he get the power, and what did he convey to the Company as the consideration? It was not retained percentages, for they had earned those in the construction of the ship. It was not an anticipated payment for they were already six months overdue. He was without power and without funds to compensate the Company for their claim, and to exact a release of something that he could neither recognize nor adjust was simply *brutem fulmen*.

If he had paid the claim the United States could have sued and recovered back any sum that he had paid, and if that is so, can the United States hold a release without payment to be valid? (McElrath *vs.* U. S., U. S.)

Second.

Another and very cogent reason exists why this release should not prevail, and that is that it was procured under conditions and circumstances that amounted to legal duress.

To establish this defence it is not necessary to show threats, fear of bodily harm, nor any of those conditions which in old times were necessary to make out such a case. The modern doctrine recognizes the fact that coercion is exercised more potently by more effective and insidious means than brute force, and there now exists but little, if any, difference between undue influence and duress.

It may be conceded for the purpose of this case that the current of authorities is to the effect that the mere refusal to pay a debt, thereby forcing a creditor to receipt in full for a part only, does not constitute duress, but that is *provided that the debtor has done nothing unlawful to cause the financial embarrassment which compelled the creditor to submit to the extortion* (Am. & Eng., Enc., 1st Ed., Vol. 6, p. 72), and the converse of that proposition is equally true, that whenever the debtor has, by any unlawful means, produced a financial condition that has compelled his creditor to submit to his

extortion, a receipt or release will be avoided for duress.

Hackley *vs.* Headley, 45 Mich., 569.

Vyne *vs.* Glenn, 41 Mich., 112.

In the case of Vyne *vs.* Glenn, 41 Mich., 112, the defendant informed the plaintiff that he had stopped payment due him from third parties; he knew that this would cause plaintiff's financial ruin and compel him to settle, and relied on a settlement made under these circumstances. In passing upon this question the court says:

> "It is idle to say that such a settlement was free and voluntary. To say that the plaintiff had a legal remedy * * * may be true generally, but where the wrong done was for the evident purpose of forcing a settlement not in accordance with the legal rights of the parties and where the delays incident to litigation would work ruin * * * to hold that he had a legal remedy for the wrong * * * would not meet the difficulties of a case like the present."

In the case of Hackley *vs.* McGordon, 45 Mich., 569 the court held:

> Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will;" and while holding in that case that duress was not made out, approved the decision in *Vyne* vs. *Glenn*, and distinguished it from the case then being decided because it was not pretended that Hackley & McGordon had done any-

thing to cause the conditions that made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand.

So in the case of Adams *vs.* Scheffer, 17 Pac. Rep., 21 (Colo.), the court there makes the same exception where financial embarrassment was the alleged duress, and holds that it " does not constitute duress if the purchaser has done nothing unlawful to cause such financial embarrassment."

And so in the case of Little *vs.* Bowers, 134 U. S., 554, this court excepted cases where payments were made when an immediate and urgent necessity existed therefore.

The doctrine is well founded on the familiar maxim that no one can be permitted to take advantage of his own wrong.

This case comes clearly within this rule. The unlawful act of the Secretary of the Navy in refusing the trial trip to which the Company was entitled under Article III of the contract, and thereby depriving them of upwards of $700,000 that they otherwise would have been entitled to, produced such a financial condition that coerced the signing of the release. No more effective coercion could have been enforced if the Secretary of the Navy had trained its guns on the Company's shipyard, and exacted the release under threat of bombardment.

It is to be borne in mind that the trial was to take place "under conditions prescribed by the Secretary,"

and until this trial was had, no money was payable. It was much more than the mere withholding of money; it was making it impossible for the Company to demand any. The Company could not lay out a course on the high seas over which the trial was to take place. The Secretary's attitude left the Company helpless. No suit could give them adequate relief, for they would be met at the threshold with a demand for proof that the vessel fulfilled speed requirements. No mandamus would lie, for the Secretary was clothed with too much discretion. His failure to furnish armor and thereby entailing a loss and expense on the Company of over $42,000 intensified the pressure brought to bear on the Company, and brings the case strictly within the doctrine contended for. This all happened in the spring of 1894 during the height of a financial panic, when bank accommodations were practically withdrawn and when the Company had to meet weekly the wages of its ten thousand employees.

One reason given in the books why a refusal to pay does not constitute duress is that the law affords a complete remedy to the creditor. He has his action and may recover his full debt, *interest for its detention and be reimbursed his costs.* That does not apply to the United States. The United States is a favored party. Neither interest nor costs can be recovered, and if an individual declines to give a release demanded he has but a limited remedy. The United States can protract litigation almost indefinitely; can put the claimant to endless cost, and at the end the claimant can only recover the bare principal of his claim, *suffer the loss of all interest and pay his expenses of litigation out of his own pocket.*

No better illustration can be given than the record of this case discloses. The petition was filed August 10, 1897 (R., p. 1); the judgment was rendered January 29, 1906 (R., p. 7), eight and one-half years later. If it had been against an individual, fifty-three per cent. interest would have been added and a judgment given for costs, more than $70,000 additional. The United States enjoying these exceptional advantages, and the claimant being without adequate remedy, was compelled to submit. The parties were not on equal ground, and as one of the chief reasons for the rule does not apply, its harsh features ought not to obtain. *Cessat ratione, cessat ipsa lax.* No one would for a moment hesitate to declare that the Company would never have voluntarily released a valid claim for $42,000; that such a release could only be obtained by duress and coercion is patent to every one. Is then justice so blind and the law so impotent that such a release cannot be set aside?

The judgment of the Court of Claims should be modified and amended by adding thereto the sum of $59,778.49, and as thus modified should be affirmed.

JOHN C. FAY,
Attorney for Appellants,
The Wm. Cramp & Sons
Ship and Engine Building Company.

HOLMES CONRAD,
EPPA HUNTON,
Of Counsel.

APPENDIX.

54th Congress, 2d Session. } HOUSE OF REPRESENTATIVES. { Document No. 69.

WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY.

Letter from the Secretary of the Navy transmitting, under instructions from the act making appropriations for the Navy for the year ending June 30, 1897, a statement of the claim of the William Cramp & Sons Ship and Engine Building Company for extra compensation for the building of certain vessels.

DECEMBER 11, 1896.—Referred to the Committee on Claims and ordered to be printed.

NAVY DEPARTMENT,
WASHINGTON, *December* 8, 1896.

To the Senate and House of Representatives in Congress assembled:

The act making appropriations for the naval service for the fiscal year ending June 30, 1897, contains the following provision:

> "The Secretary of the Navy is hereby authorized and directed to examine claims against the Government which may be presented to him by contractors for the building of the hulls or machinery of naval

vessels under contracts completed since January first, eighteen hundred and ninety-one, where it is alleged that such contractors have been subjected to loss and damage through delays in the work under said contracts which were not the fault of said contractors, but were due to the action of the Government, and to report to the next session of Congress the result of said investigation, and whether said claims are, in his opinion, subjects for the jurisdiction of the Court of Claims or for the action of Congress upon the same."

Under authority of this law the William Cramp & Sons Ship and Engine Building Company has presented claims against the Government for loss and damage due to delays alleged to have been caused by the Government in the construction of the *New York*, the *Columbia*, the *Massachusetts*, and the *Indiana*, and copies of these claims are transmitted herewith. Accompanying the claims are statements setting forth at great length the matters upon which the same are founded. In each case it is alleged by the contractors that the delays complained of were due to the failure of the Government to supply the armor or other materials in accordance with the provisions of the several contracts under which these ships were being constructed, and in the case of the *New York* that further delay occurred by reason of the changes authorized by the Department in the plans and specifications.

Claims are also made for large amounts of interest due on sums the payment of which it is alleged was deferred by fault of the Government, for sums paid out for insur-

ance, and for other special losses arising by reason of circumstances particularly set forth in said statements.

The claims aggregate as follows: On account of the *New York*, $211,018.31; on account of the *Columbia*, $192,235.79; on account of the *Massachusetts*, $483,757.49, and on account of the *Indiana*, $480,231.90.

I have considered carefully the nature of these claims and the circumstances out of which they arose, and while not attempting to pass on the merits of the same or to determine the amount, if any, that should be allowed on account of the matters mentioned, the fact exists that there was delay in the completion of the contracts beyond the time prescribed therein, and that such delay was in some measure at least due to failure on the part of the Government to obtain and furnish to the contractors the armor for the vessels as required, and in my judgment the interests of justice demand that they should be referred to the Court of Claims, which can consider these matters with more deliberation and care than could be devoted to them by the committees of the two Houses of Congress.

In this connection attention is invited particularly to the provisions of the memoranda of agreements made with the contractors in modification of the contracts for the construction of the *Indiana* and the *Massachusetts*, dated, respectively, May 10, 1894, and February 1, 1896, copies of which are inserted in the statements of claim herewith on account of those vessels, wherein the contractors expressly released the Government from all and every claim for loss or damage theretofore sustained by

them by reason of any failure on the part of the Department to comply with the terms of said contracts, or on account of any delay theretofore occasioned by the action of the Department.

It will be observed that the contractors claim relief from the binding force of these agreements on the ground that the same were entered into by them under duress.

Very respectfully,

H. A. HERBERT, *Secretary.*